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In the Supreme Court of the United States

October Term, 1957

No. .....

W. E. HOWARD, JR., PETITIONER

v.

KENNETH T. LYONS AND JOSEPH S. MCATEER

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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The Solicitor General, on behalf of Rear Admiral W. E. Howard, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-captioned case on January 13, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 26-28) is not reported. The opinion of the Court of Appeals (App., *infra*, pp. 16-24) is reported at 250 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1958 (App., *infra*, pp. 24-25). The

time to file a petition for a writ of certiorari was extended to, and including, April 28, 1958, by order of Mr. Justice Frankfurter (App., *infra*, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an executive officer below cabinet rank has absolute immunity from liability in defamation with regard to the communication of an official report to members of Congress when such communication is made as part of the officer's duty and relates to matters committed by law to his control and supervision.

STATEMENT

This is a libel suit brought by two civilian employees of the Boston Naval Shipyard against the petitioner, Rear Admiral W. E. Howard, Jr., the commanding officer of the shipyard. The alleged libel was contained in an official report written by Admiral Howard to two of his superior officers, copies of which were sent to the members of the Massachusetts congressional delegation.

The District Court granted petitioner's motion for summary judgment on the ground of absolute privilege, finding that the pleadings and affidavits filed in support of the motion showed "conclusively that the statements attributed to the defendant were published by him in the discharge of his official duties and in relation to matters committed to him for determination" (R. 26). The factual background for this finding may be summarized as follows:

The respondents are civilian employees of the Department of the Navy, employed at the Boston Naval Shipyard, and both are officers of the Federal Employees Veterans Association, Inc., an organization composed of veterans of military service in the employment of the Federal Government (R. 2). The Association was accorded official recognition by the shipyard administration as an employees' representative group in 1949 (R. 10). After a time, the shipyard administration found that the activities of the Association were becoming increasingly disruptive of good industrial relations and were having a detrimental effect on employee morale.

The details of the administration's conclusions were set out in the report which is the subject matter of this litigation (R. 9-17). In the report, addressed to the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, Admiral Howard stated that a newsletter published by the Association had become severely critical of shipyard management and of the Navy and Defense Departments, to the point of being defamatory; that the purpose of the newsletter was to thwart the aims of the administration in the accomplishment of its mission and to further the personal self-interest of the Association's officers; that management meetings with the Federal Employees Veterans Association, in contrast to those with other recognized employee groups, were seldom productive of useful and constructive results primarily because of the Association's insistence on magnifying trivialities and its scornful attitude toward management personnel; that the Association's activi-

ties were subversive of shipyard management; that the situation was aggravated by the fact that the Association gave wide publicity to its charges by placing copies of its newsletters with the local press and with members of the Massachusetts congressional delegation; and that, because of the adverse effect of these activities on efficient shipyard operation, and in an effort to protect responsible employee groups, recognition of the Association would be withdrawn (R. 12-17).

This report, setting forth the basis of his action in withdrawing recognition, was sent by Admiral Howard, as Commander, Boston Naval Shipyard, to the two addressees—the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, both in Washington. Copies of the Association's newsletters were attached as enclosures. A copy of the report was sent by Admiral Howard to each member of the Massachusetts congressional delegation because of their known interest in employee relations at the shipyard, because they were known to have received copies of the Association's newsletters, and because they had received copies of charges made by the Association against the shipyard management and an official Navy report of an investigation of those charges (R. 14, 16, 25).

In accordance with applicable Navy regulations, Admiral Howard transmitted copies of the report to the Commandant, First Naval District, who in turn authorized their routine release through the District's Public Information Officer to the editors of various newspapers in Boston (R. 23-25). Admiral Howard,

the sole defendant in this case, did not release the report to any representative of the press (R. 25).

It was stated in an affidavit by Admiral Howard's immediate commanding officer (R. 23-24) that the preparation of the report and its transmittal to the addressees and to the District Commandant were all included among Admiral Howard's official duties and were done in the course of performing those duties; that also included among his duties was "the furnishing of copies to the Massachusetts congressional delegation of his official notification to the Bureau of Ships of personnel action taken by him as Commander, Boston, Naval Shipyard." In addition, Admiral Howard stated in his own affidavit that he sent copies of the communication to the Congressmen "[i]n the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, * * * " (R. 25). These affidavits were uncontroverted and, aside from the formal papers, constitute the entire record in the case.

On appeal, the Court of Appeals (Judge Woodbury dissenting) reversed the judgment in favor of petitioner and ordered the case remanded for further proceedings (App., *infra*, pp. 16-25). The court held that petitioner was absolutely privileged with respect to the communication of the report to his superior officers and that this privilege was not affected by his awareness that a higher authority, over whom he had no control, would undoubtedly release a copy of the report to the press. But the court held that, with

respect to the communication of the report to members of Congress, petitioner was entitled only to a qualified privilege, requiring him at a trial to satisfy a jury of his good faith. The requirement would be imposed despite the fact, as the court recognized, that the report related to a matter in which the congressmen had an official interest, the fact that petitioner considered the communication of the report to the congressmen to be a proper exercise of his official duty, and the fact that the communication was made, as the court itself noted, "in the course of the performance of his executive functions * * *". (App., *infra*, p. 21).

The court added that it would reach this result regardless of whether the case was decided under "federal common law" or under the law of Massachusetts, and declined to decide which body of law was applicable. In this connection, however, the court posed the following question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say?" (App., *infra*, p. 22).

In his dissent, Judge Woodbury equated the communication of the report to members of Congress with the communication of the report to petitioner's superior officers, since both were part of petitioner's official duties. In addition, Judge Woodbury stressed the policy of keeping members of Congress informed with respect to matters pertinent to their legislative duties and functions (App., *infra*, pp. 23-24).

REASONS FOR GRANTING THE WRIT

The decision in this case is of fundamental significance in the increasingly important field of the privilege of federal officials from liability in defamation. The precise question it presents is whether absolute immunity extends to communications from executive officers below cabinet rank to members of Congress concerning matters in which the latter have an official interest. However, in holding that such a communication is entitled only to a qualified privilege, the Court of Appeals has departed from the broad underlying premise of every federal decision in this area, *i.e.*, that federal courts, without inquiring into questions of motivation, will not hold government officials personally liable in defamation for acts done in the performance of their duties. *E.g.*, *Spalding* v. *Vilas*, 161 U.S. 483; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643. This proposition was assumed even in the two other federal appellate cases in which government officials have been denied the defense of absolute privilege. *Barr* v. *Matteo*, 244 F. 2d 767 (C.A.D.C.), judgment vacated, 355 U.S. 171; *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.). For the first time, the accepted governmental privilege has been so restricted as to be held inapplicable to communications between government officials, despite the uncontroverted fact that the communication here was part of the petitioner's official duties and related to a matter committed by law to his control and supervision.

The effect of the decision, in our view, will be seriously to encumber the free flow of official information from the executive to the legislative branch of government. In addition, the question of absolute immunity of government officials from personal tort liability has become increasingly important in the past years and has not received the attention of this Court since its decision in *Spalding* v. *Vilas*, *supra*. For these reasons, we believe that the ruling merits review.

1. *The precedents.* In *Spalding* v. *Vilas*, *supra*, this Court held that the head of an executive department was immune from liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U.S. at 498. The immunity was absolute so that, as long as the statement was not unauthorized by law or beyond the scope of official duties, motive was wholly immaterial. And, in order to receive the protection of absolute immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed. 161 U.S. at 498-499.

The principles of that decision were followed by the Court of Appeals for the District of Columbia Circuit with respect to official communications later publicized (*Mellon* v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U.S. 530), and as to press releases issued by department heads (*Glass* v. *Ickes*, 117 F. 2d 273, certiorari denied, 311 U.S. 718). The doctrine was extended by that court and by other courts of appeals

to cases involving government officials below the department head level. *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U.S. 643; *Farr* v. *Valentine*, 38 App. D.C. 413; *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167, appeal dismissed, 199 U.S. 616.[1] The controlling factor in those cases was whether the act complained of was within the scope of the official's authority. And the courts recognized that because it is through these lesser officials, acting under appropriate delegations of authority, that the business of government is carried on, "[i]t is * * * not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." *De Arnaud* v. *Ainsworth*, *supra*, at 181.

Government officials have been denied the defense of absolute privilege in only two federal appellate cases, both decided by the Court of Appeals for the District of Columbia Circuit. *Barr* v. *Matteo*, *supra*; *Colpoys* v. *Gates*, *supra*. Neither of those decisions supports the position of the respondents in this case, since those cases turned on whether or not the official's acts were within his "general line of duty." In the *Colpoys* case, the court held that a United States Marshal was outside his "general line of duty," and hence not privileged, in issuing a statement to the

[1] See also *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6); *Love* v. *Snyder*, 184 F. 2d 841 (C.A. 6); *United States* v. *Brunswick*, 69 F. 2d 383 (C.A.D.C.); *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R.I.); *Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N.D. Ill.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky.); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.).

press with respect to the discharge of two of his deputies for alleged malfeasance. In the *Barr* case, this rule was extended to include policy-making officers below cabinet or comparable rank; the court there held that the Acting Director of the Office of Rent Stabilization went outside his line of duty in issuing a statement to the press concerning disciplinary action to be taken by him against two of his subordinates. In both cases, the court adhered to the general rule that acts done in the performance of official duties are absolutely privileged, but held that the particular officers involved were not performing such duties when they engaged in a general public discussion of official matters. In the present case, however, uncontroverted affidavits established that in communicating with members of Congress petitioner was acting in the course of his duties, and the Court of Appeals recognized that his communication was made "in the course of the performance of his executive functions * * *," (App., *infra*, p. 21).

2. *The necessity that the immunity be absolute.* The federal decisions have generally recognized that, if the true purpose of the rule of immunity is to be effectuated, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such delicate questions of fact as proper motivation and reasonableness of conduct. See *Gregoire* v. *Biddle*, 177 F. 2d 579, 581, (C.A. 2), certiorari denied, 339 U.S. 949; *Cooper* v. *O'Connor*, *supra*, at 140. "* * * [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would

dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, *supra*, at 581. The effectiveness of the immunity is all but destroyed if the official is required to subject himself to a full-scale trial, even though its outcome may be favorable to him. The purpose of the rule of absolute immunity is to end litigation at its inception without the necessity of a jury inquiry into the justification for official action, and the possibility of examination and cross-examination into questions of motivation, malice, and good faith. Vigorous performance of duties untrammeled by the fear of retaliation by burdensome private damage actions, with their grave personal impact on the official, requires the existence of an absolute privilege with respect to acts done in the course of those duties. The ruling of the Court of Appeals subjects the official to just such a burdensome trial in every case.

The Court of Appeals did hold that petitioner's communication of the report to his military superiors was absolutely privileged. But we perceive no sound basis for limiting the rule to such cases and holding it inapplicable to communication of the report to members of Congress. Both communications were equally a part of petitioner's official duty. The latter communication was made by petitioner in accordance with the Navy Department policy that members of Congress be kept informed by commanding officers of matters in which the congressmen have an official interest (R. 25). Certainly, this policy is both authorized and desirable, and uncontroverted affidavits

established that petitioner was doing nothing more in this case than executing that policy (R. 23-25). As noted by Judge Woodbury in his dissent, application of the rule of absolute immunity is necessary to assure that Congress receive a free flow of information needed to exercise its own functions and to free executive officers "from the restraints naturally flowing from the fear of a lawsuit in which they might or might not succeed in convincing the trier of fact of their good faith" (App., *infra*, p. 24). It is surely not uncommon or undesirable for government agencies to seek to keep Congress informed of current activities within the agency.

3. *This Court's order in the Barr case.* In *Barr* v. *Matteo*, 355 U.S. 171, the Government, on behalf of a former Director of the Office of Rent Stabilization, petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit that a press release issued by an agency head below cabinet rank was not absolutely privileged. This Court granted the petition, vacated the judgment of the Court of Appeals, and remanded the case to that court with directions to pass upon the petitioner's claim of a qualified privilege. This Court held (355 U.S. at 172-173):

> * * * Especially in a case involving on the one hand protection of the reputation of individuals, and on the other the interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties, this Court should avoid rendering a decision *beyond the obvious requirements of the record.*

> In the present case a ground far narrower than that on which the Court of Appeals rested its decision, the defense of qualified privilege, was consistently pressed in the District Court and in fact urged in the Court of Appeals itself. In these circumstances we think that the broad requirements of judicial power and its proper exercise should lead to consideration of the defense of qualified privilege. [Emphasis added.]

The record in the instant case, like that in *Barr*, presents an important issue of public law involving the competing considerations of the individual's reputation and the public's interest in free disclosure of official matters. But, unlike the record in *Barr*, the record here does not permit the litigation to be disposed of on a narrower ground. The important difference between this case and *Barr* is that here the defense of absolute privilege was sustained on motion for summary judgment in the District Court, so that there is no record with respect to the issues involved in the defense of qualified privilege. The latter defense was not presented to the District Court or to the Court of Appeals. In *Barr*, on the other hand, the District Court overruled the absolute immunity defense, and since this was not an appealable order, the case was tried before a jury on the other issues. Thus, the Court of Appeals in *Barr* had before it a complete record upon which it could have disposed of the litigation without necessarily having reached the broad question of absolute privilege. Given this fact, the error of the Court of Appeals, this Court ruled, was in holding Barr to his original waiver and not considering, on the record before it, the defense of

qualified privilege. In the instant case, no trial has been conducted, and the decision of the Court of Appeals requires the petitioner to do precisely what we have contended the rule of absolute privilege is designed to avoid, *i.e.*, litigate in a trial before a jury questions of motivation, reasonableness of conduct, and good faith. In the *Barr* case, this Court did not require that a second trial be conducted, but only that the Court of Appeals first consider the narrower question presented by the record, especially since that question "was consistently pressed in the District Court and in fact urged in the Court of Appeals itself" (355 U.S. at 173).[2]

4. *Applicable law.* The court below adverted to the question of "whether the present case is to be governed by the law of Massachusetts, as declared in the state courts, or whether this is a case where legal relations are governed by a 'federal common law,' a body of decisional law developed by the federal courts untrammeled by state court decisions." (App., *infra*, p. 22). The court found it unnecessary to resolve the question since "it would make no difference in the proper disposition of the present case." But the court posed this question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts

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[2] On remand in *Barr*, the Government has in fact argued in the Court of Appeals that the record, without the necessity of a second trial, establishes Barr's good faith.

might say?" (c ing the decision of this Court in *United States* v. *Standard Oil Co.*, 332 U. S. 301).

We believe that this question must be answered in the affirmative. Indeed, with the exception of this case, all of the federal courts which have dealt with the question of privilege of federal officials have, without even any discussion, treated the issue as one of federal law. In our view, a uniform federal rule is essential so that uniform results will be reached and the availability of the immunity defense will not depend on the peculiarities and variations of local law. Furthermore, since the controlling factor in these cases is generally the scope of the defendant-officer's official duties, the problem becomes one of the relationship of the officer to the federal government he serves, which must of necessity be resolved by the law of that government. Cf. *In re Neagle*, 135 U.S. 1.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

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BERNARD CEDARBAUM,
Attorneys.

APRIL 1958.

APPENDIX.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5263.

KENNETH T. LYONS ET AL., PLAINTIFFS, APPELLANTS,

v.

W. E. HOWARD, JR., DEFENDANT, APPELLEE.

Appeal from the United States District Court for the District of Massachusetts.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alfred Sigel, with whom *Irving Kaplan* was on brief, for appellants.

Paul A. Sweeney, Attorney, Department of Justice, with whom *George Cochran Doub*, Assistant Attorney General, *Bernard Cedarbaum*, Attorney, Department of Justice, *Anthony Julian*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

January 13, 1958.

MAGRUDER, *Chief Judge*. We have before us an appeal by two plaintiffs, citizens of Massachusetts, from a summary judgment for defendant, a citizen of Maryland, under a complaint for libel.

The defendant is Rear Admiral W. E. Howard, Jr., Commander of the Boston Naval Shipyard. It appears that defendant, as commander of the

shipyard, had become increasingly irritated by the conduct of a labor organization called Boston Naval Shipyard Post No. 1. The parent national organization of this local is the Federal Employees Veterans Association, Inc., of which plaintiff Kenneth T. Lyons, who works at the Boston Shipyard, is National Commander. The other plaintiff, Joseph S. McAteer, also alleged to be an employee of the shipyard, is Commander of Boston Naval Shipyard Post No. 1.

Plaintiffs charge that they are entitled to recover damages for defamatory matter contained in a letter written by defendant on September 8, 1955, addressed to the Chief of the Bureau of Ships, Department of the Navy, Washington, D. C., and also to the Chief of Industrial Relations, Office of Industrial Relations, Department of the Navy. In this letter defendant undertook to explain to his superiors why he had determined to withdraw recognition, as of September 9, 1955, from "Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard".

This letter alleged that plaintiff Lyons by name, and the other plaintiff by description, "exercise a predominant influence" in the organizational activities; that the organization has been giving wide distribution to a newsletter or bulletin; that this bulletin has become more and more unfairly critical of the shipyard administration, for the purpose of not only thwarting the aims of the shipyard administration in the accomplishment of its mission, but also to further personal aims and self-interests of the individuals in control of the labor organization; that these "editorial expletives" have adversely affected the general morale of employees of the shipyard, who are entitled to be protected against such "overt subversion" by any

labor group "whose methods and whose motives are unethical, uninhibited, and lack the integrity of purpose that could reasonably be expected."

The complaint charges that the intent and meaning of the defendant's foregoing letter was to charge that each of the plaintiffs was false to his trust as an officer of the said organization, in engaging in subversive activities directed to the end of obstructing the legitimate purposes of the labor organization and of the shipyard management; that the statements contained in defendant's letter were as a whole written maliciously, wickedly, recklessly, willfully and falsely.

The summary judgment for defendant was based upon a ruling of law that the undoubtedly defamatory statements attributed to the defendant, as commanding officer of the Boston Naval Shipyard, were published by him in the discharge of his official duties, in relation to matters committed to him for determination; and that in respect thereto the defendant was completely and absolutely immune from civil liability, regardless of motive.

There are three possible publications charged in the complaint: (1) The official letter or memorandum to the defendant's superior officers, notifying them of the action taken by him in withdrawing recognition of the employee group at the Naval Shipyard; (2) the communication by defendant to each member of Congress from Massachusetts of copies of this official memorandum or report; (3) the communication by defendant to the United Press, the Associated Press, the International News Service, and to all of the daily papers in the city of Boston, of copies of the aforesaid official report.

As to publication (1) above, it appears from the uncontradicted affidavit of Rear Admiral Snacken-

berg, Commandant of the First Naval District, and defendant's immediate military superior, that among Rear Admiral Howard's official duties was "the making of reports to the Bureau of Ships, United States Navy, relative to any significant action taken by him with respect to the personnel, civilian or military, employed or stationed at the Boston Naval Shipyard." In deference to the decided cases, we feel obliged to hold, so far as this official report is concerned, that the defendant is protected by an absolute immunity from civil liability. *United States* v. *Brunswick*, 69 F. 2d 383 (C.A.D.C. 1934); *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167 (1904); *Farr* v. *Valentine*, 38 App. D.C. 413 (1912); *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6th, 1952); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md. 1933); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky. 1938). See also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950); *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4th, 1950).

Of course the policy behind the granting of such absolute immunity is not to protect wicked defendants from the normal civil liabilities for the publication of defamatory statements maliciously and in bad faith. Rather, the policy is to further what is deemed to be the greater public interest of assuring to conscientious public officials complete freedom in the exercise of their duties, without the inhibiting fear of possible lawsuits in which they would have to satisfy a jury of their own good faith.

Whether the courts may perhaps have gone too far down the line in developing this doctrine of absolute immunity may be a fair question; at any rate we shall not be astute to develop further the categories of absolute immunity.

We shall now say a word about publication (3)

above set forth, namely, distribution of copies of the official report to various representatives of the press. We understand that counsel for appellants abandoned this point on appeal. The record contains an unchallenged affidavit by the defendant in support of his motion for summary judgment stating that he "did not release or cause to be released any document or communication . . . to any representative of the press." It appears from the affidavit of Admiral Snackenberg that the office of the Commandant of the First Naval District makes it a practice of releasing pertinent information to the press; that during his official absence "the then acting Commandant, First Naval District, Captain John A. Glick, U. S. Navy, authorized the routine release, through the Public Information Officer of Headquarters, First Naval District," to representatives of the press of copies of the official memorandum from the Commander of the Boston Naval Shipyard to the Chief of the Bureau of Ships in Washington, D. C. Thus, when the defendant forwarded through channels his official report, he might well have foreseen that copies of such report would surely be released to the press by higher authority. But if Admiral Howard was protected by an absolute immunity in making such official report, it seems to us obvious that he would not lose that immunity by reason of the fact that a higher authority, over whom he had no control, would undoubtedly release to the press a copy of the official communication.

That leaves for consideration the second publication mentioned above. In this respect the defendant's affidavit conceded that in the course of his official duties "and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest," he sent copies

of his official memorandum to each of the members of the Massachusetts congressional delegation. It is true that these members of Congress did have an official interest in being kept advised of important developments in labor relations at the Boston Naval Shipyard. It is therefore understandable and certainly not officious that the Commander of the Boston Naval Shipyard might have conceived it to be a proper exercise of his official functions to see to it that the members of Congress should receive copies of such official report, especially as this report was in a sense an answer to charges of maladministration at the Naval Shipyard contained in the newsletters or bulletins of the Boston Naval Shipyard Post No. 1, which the plaintiffs themselves had taken pains to supply to the members of Congress from time to time. Therefore, in making this communication to the members of Congress in the course of the performance of his executive functions, we think that the defendant ought to be protected by a qualified or conditional privilege so far as concerns liability for matters of defamation which may be contained therein. See Am. L. Inst., Restatement of Torts § 599 *et seq.* It would be an unwholesome thing to extend to this situation the protection of an absolute immunity such as has been held to apply to official reports to a superior officer.

The protection of judicial officers from the fear of civil lawsuits has been a matter of special concern to the courts. See *Bradley* v. *Fisher*, 13 Wall. 335 (U.S. 1871). There is no doubt that a judge is absolutely immune from civil liability on account of defamatory matters included by him in a judicial opinion which is officially released. Yet the Court of Appeals of New York, in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E. 2d 257 (1943), held that such absolute immunity

did not protect a judge in furnishing a copy of his judicial opinion to the West Publishing Company for publication in a series of unoffiical reports. The case illustrates the tendency of the courts narrowly to confine the doctrine of absolute immunity. The position of the Commandant of the First Naval District is certainly no stronger than was that of the judge who was a defendant in *Murray* v. *Brancato*.

We may add that we have some question whether the present case is to be governed by the law of Massachusetts, as declared in the state courts, or whether this is a case where legal relations are governed by a "federal common law," a body of decisional law developed by the federal courts untrammeled by state court decisions. Cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539 (C.A. 1st, 1940). It would be difficult to challenge the constitutionality of an act of Congress prescribing an absolute immunity from civil liability, or a conditional privilege, in the case of official reports made by a naval officer to his superiors. In the abence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say? Cf. *United States* v. *Standard Oil Company of California*, 332 U.S. 301 (1947). We pose this question without undertaking to decide it, for we think it would make no difference in the proper disposition of the present case. The complaint here was founded on diversity of citizenship. However, counsel for the parties seem to have presented the case as one of general common law not confining themselves to the law of any particular jurisdiction. Even if Massachusetts law is controlling, we have no reason to suppose that it would extend the doctrine of absolute

immunity to cover defendant's publication to the members of the Congress. As recognized by the Supreme Judicial Court in *Howland* v. *Flood*, 160 Mass. 509, 516 (1894): "There are comparatively few cases in which parties are protected absolutely from liability for statements which turn out to be defamatory."

A judgment will be entered vacating the judgment of the District Court and remanding the case to that Court for further proceedings not inconsistent with this opinion, no costs on appeal.

WOODBURY, *Circuit Judge*, (dissenting in part). The question is close and authority bearing directly upon it appears to be lacking, but under the circumstances of this particular case I would equate the defendant's communication to the members of the Massachusetts congressional delegation to his communication to his superior officers. I certainly would not go so far as to say that one in the defendant's position always enjoys an absolute immunity from civil liability for defamatory statements in communications addressed to members of Congress. But I would say that there is absolute immunity when, as here, the communication to members of Congress is not gratuitous or officious but is made in accordance with the established departmental policy and practice of keeping members of Congress informed of matters in which they have an official interest, and certainly they have an official interest in matters affecting labor relations at military installations in their districts.

I do not think it would be unwholesome to extend the protection of an absolute immunity to the situation before us. On the contrary, it seems to me that beneficial results might well be expected from a rule giving absolute protection to military officers not only with respect to their communications to their supe-

riors, but also with respect to copies of those communications sent to members of Congress, when the subject matter thereof is pertinent to their legislative duties and functions.

I would say that Congress can be assured of receiving a free flow of unwatered down information of the kind it needs wisely to exercise its legislative supervision over the military establishment only if military officers like the defendant are free from the restraints naturally flowing from the fear of a lawsuit in which they might or might not succeeed in convincing the trier of fact of their good faith. I see no occasion to anticipate that the rule I advocate would work undue hardship on persons defamed. The congressional audience is small and we ought to assume that no member of that body would be a party to the dissemination of calumny. As far as sanctions are concerned, it seems to me that fear of military discipline, perhaps at the instigation of a member of Congress outraged at the libel of a constituent, provides an adequate deterrent. I would affirm the District Court.

[Caption omitted]

JUDGMENT

January 13, 1958.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent

with the opinion passed down this day; no costs on appeal.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

SUPREME COURT OF THE UNITED STATES
October Term, 1957

No. ———

W. E. HOWARD, JR., PETITIONER,

vs.

KENNETH T. LYONS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 28, 1958.

/s/ FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States.

Dated this 9th
day of April, 1958.

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